IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1789

KENNETH L. SATTERWHITE,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

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October Term, 1977

No. .....

KENNETH L. SATTERWHITE,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

Petition for a Writ of Certiorari to the Court of Criminal Appeals of the State of Texas

Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Court of Criminal Appeals of the State of Texas entered herein on February 15, 1978, motion for rehearing denied.

OPINION BELOW

There is no written opinion by the trial court. The memorandum opinion of the Texas Court of Criminal Appeals is unreported and is printed in Appendix A, infra, p. A-1.

JURISDICTION

The judgment of the court below was entered on February 15, 1978, and motion for rehearing denied March 22, 1978. Jurisdiction of this court is invoked under U.S.C §1257(3).

QUESTION PRESENTED

Whether discussion by the jury of an incorrect assertion about the effects of parole laws, during their deliberations on the sentence to be imposed, denied petitioner the rights guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved provide in pertinent part:

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury; . . . to be confronted with the witnesses against him; . . . U.S. CONST. amend. VI

Fourteenth Amendment

No State shall . . . deprive any person of life, liberty or property without due process of law . . . U.S. CONST. amend. XIV §1

The various state statutes involved are printed in the Appendix B, infra, p. A-9.

STATEMENT

Petitioner was convicted in the District Court of Erath County, Texas for sexual abuse of a child, and sentenced to confinement in the Texas Department of Corrections fo a term of 18 years. After a hearing,

his motion for new trial was denied by the trial judge, which judgment was later affirmed by the Texas Court of Criminal Appeals.

One week prior to petitioner's trial, there appeared on the front page of the Stephenville Empire-Tribune[1] an article entitled "What Makes a Good Juror?". The article included the following quotations attributed to the local district attorney, who subsequently prosecuted this case:

> "An informed juror makes a good juror. A juror needs to know that when a prosecutor asks for a 25 year sentence in the penitentiary he is asking for one-fifth of that time , . . . when more juries realize that the criminal will serve only one-fifth of his sentence, they may understand why DA's ask for more time."[2]

Soon after petitioner's trial, several members of the jury which had heard his case, were contacted by his attorney.[3] For the first time, it became apparent that

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[1] The Stephenville Empire-Tribune is a daily newspaper with a circulation of 5,000 which originates in the city (population 11,000) where the petitioner was tried.

[2] Article 42.12, §15(a)(b), Texas Code of Criminal Procedure, provides that a prisoner is eligible for parole only after he has served one-third of the maximum sentence imposed, or twenty years, whichever is shorter; even if the parole law had been correctly stated, it is "palpably erroneous" to assume that a defendant will be discharged as soon as parole becomes available. *See Sweed v. State*, 538 S.W.2d 119, 120, n. 4 (Tex.Cr.App. 1976).

[3] Under Texas practice, upon completion of their service in a case, the jurors are released from their strict secrecy by the trial judge. The instruction given in this case was: "You are now released from your secrecy and you may talk about the case if you want to. Sometimes persons will come to you and want to talk to you, attorneys or other persons, and ask you what happened and what happened in the jury room or elsewhere. If you wish to, you are free to talk to those persons,

some of the jurors had not only read the newspaper article when it was originally printed, but also that the indeterminant sentence law, as described in the article, was mentioned and discussed during the jury's private deliberations on punishment.[4] At least two of the jurors also saw the article, which had been posted by some unknown person on the bulletin board in the courthouse, during the trial and after they had been selected for jury duty.

Petitioner immediately filed a motion for new trial, specifically raising a claim that he had not received "a fair and impartial trial as guaranteed by the United States Constitution . . ." This was pursued in the appellate court by point of error and in the closing argument of his brief[5] reading as follows:

> ". . . the information which was received by the jury . . . did in fact violate Appellant's Sixth Amendment right to trial before an impartial jury, as guaranteed by the United States Constition . . ."

on the other hand, if you don't want to talk to them, you are free to decline to talk with them."

Additionaly, Article 40.03(8) of the Texas Code of Criminal Procedure (supp. 1978) provides: "It shall be competent to prove such misconduct by the voluntary affidavit of a juror; and the verdict may, in like manner, be sustained by such affidavit."

[4] The Texas criminal trial is a birfurcated proceeding (See Art. 30.07(2) of the Texas Code of Criminal Procedure [supp. 1978]). It is during the second or "punishment" phase of the hearing that the jury hears evidence bearing upon and then retires to consider the single question of the length of the penitentiary term to be imposed. No testimony or evidence concerning the possibility that a defendant will be released on parole prior to actually completing the penalty assessed is allowed.

[5] Article 40.09(9) of the Texas Code of Criminal Procedure provides that any arguments included in the appellant's brief supporting a particular ground of error are construed with it in determining what point of objection is sought to be raised.

It is unclear from the Texas court's opinion upon which ground, state or federal, it ultimately disposed of the case.[6] It seems certain, however, that the federal constitutional claim was impliedly overruled, or alternatively, that the holding is subject to review by this Court, since the federal question is clearly incorporated in the state statutes by reference.

REASONS FOR GRANTING THE WRIT

The precise issue involved in this case rarely arises in a federal prosecution, but its resolution is of vital importance to the administration of justice in many states and to the protection of the jury process. A serious constitutional problem arises whenever extrinsic evidence finds its way into the jury room.

The court below stated in its opinion that although petitioner had clearly shown an incorrect statement of the parole law contained in the newspaper article was in fact discussed in the jury room, he should also have proved this receipt of outside evidence to have been "detrimental" before a new trial would be necessary. Petitioner failed to meet *his* burden because "there is no evidence that any juror relied on or was influenced by the article or the jury's discussion of it." The court found "no evidence" of reliance solely because each of the jurors called at the hearing "unequivocally testified that the article did not affect his

[6] The granting of a motion for new trial is limited by the Texas Code of Criminal Procedure to specific statutory grounds (see Appendix B, infra, p. A-10), upon which petitioner necessarily concentrated his argument below. By simply stating that petitioner's contentions were overruled, the court actually reached and disposed of the case on all the grounds urged.

vote on punishment."

This standard directly contradicts the criteria in *United States v. Howard*, 506 F.2d 865 (5th Cir. 1975), and conflicts, in principle, with the decisions of this Court in *Mattox v. United States*, 146 U.S. 140 (1892); *Remmer v. United States*, 347 U.S. 227 (1954); and *Parker v. Gladden*, 385 U.S. 363 (1966).

The test adopted shifts the burden of proof upon the defendant to show detriment or harm; fails to recognize the presumptive harmfulness of the outside influence; and allows the use of impermissible evidence to rebut this presumption.

This Court has now specifically rejected the rule that a substantial showing (by the defendant) of prejudice in fact must be made before a due process violation can be found. *Parker v. Gladden*, 385 U.S. at 368 (Harlan, J. dissenting). Perhaps nowhere more clearly than under the circumstances of this case would such a requirement, " 'as a practical matter, take from a defendant his right to a fair trial.' *Little v. United States*, 73 F.2d 861, 866 (10th Cir., 1934)." *Farese v. United States*, 428 F.2d 178, (5th Cir., 1970). Nevertheless, this Court has never definitively identified the type of evidence of jury misconduct which a court should accept nor the extent of the proof to be required, in order to properly safeguard a defendant's right. *Cf. Mattox v. United States*, 146 U.S. 140 (1892). This question clearly has constitutional dimensions. *United States ex rel. DeLucia v. McMann*, 373 F.2d 759 (2nd Cir. 1967).

Once an extraneous communication to the jury

about the matter pending before them is shown, it is presumptively deemed to have been harmful, and the burden rests heavily upon the state to demonstrate that it was not prejudicial. *Remmer v. United States*, 347 U.S. at 229. The lower Court exacts the impossible from a defendant, particularly in light of the rule that a juror may not be allowed to impeach his verdict, when it requires him to show *why* a juror increased his vote on punishment.[7] If the new information, "within the range of a reasonable possibility, may have affected the jury's verdict, the defendant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence them." *Farese v. United States*, 428 F.2d at 180.[8]

> "There is general accord that a new trial should be directed upon proof merely that evidence of this sort came irregularly before the jurors and was considered by them, without the court either speculating upon or inquiring into the actual effect of the matter upon their verdict.
> *State v. Kociolek*, 20 N.J. 92, 118 A.2d 812, 58 A.L.R.2d 545 (1955).

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[7] This assumes an actual change of vote is requisite to indicate harm, a question that need not be answered here because the record does reveal that at least one of the jurors enlarged her vote after the discussion complained of.

[8] *See also United States ex rel. Doggett v. Yeager*, 472 F.2d 229 (3rd Cir. 1973); *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968), *cert. denied*, 400 U. S. 1022 (1969) (whether a juror *can* render a verdict based solely on evidence adduced in the court room should not be adjudged on that juror's own assessment of self-righteousness *without something more*); *United States v. Adams*, 385 F.2d 548, 550-51 (2nd Cir. 1967) (jury breach not to be condoned if there is the slightest possibility that harm could have resulted); *United States v. Thomas*, 513 F.2d 536 (5th Cir. 1975) (*Chapman* proof beyond reasonable doubt that error is harmless required of State).

Petitioner suggests this is a particularly appropriate case for granting certiorari. The conflict with federal cases, cases from other states, and even with Texas cases is clear. The issue is important to judges, prosecutors, and jurors, as well as criminal defendants. The denial of due process is clear, especially because of the Texas context. *See Clanton v. State*, 528 S.W.2d 250 (Tex.Cr.App. 1975); *Hernandez v. State*, 366 S.W.2d 575 (Tex.Cr.App. 1963) (evidence so grossly improper and prejudicial that it could not even be cured by the court's instruction not to consider).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a writ of certiorari should be granted.

Respectfully Submitted,

McMILLAN & LEWELLEN
P. O. Box 652
Stephenville, Texas 76401
(817) 965-5023
Counsel for Petitioner

By _____

CERTIFICATE OF SERVICE

I, Garry Lewellen, a member of the Bar of the United States Supreme Court, appearing herein as counsel for the Petitioner, hereby certify that this 13th day of June, 1978, three copies of the above and foregoing Petition for Writ of Certiorari were served on each of the following opposing parties: Dave Kendall, Office of the Attorney General of Texas, P. O. Box 12548, Austin, Texas 78711, and Robert J. Glasgow, District Attorney, 211 North Belknap, Stephenville, Texas 76401, by depositing the same in the United States mail, postage prepaid.

_____

APPENDIX

KENNETH LERON SATTERWHITE,
Appellant

v.

THE STATE OF TEXAS, Appellee

No. 54,003

Court of Criminal Appeals of Texas,
Panel No. 3
February 15, 1978

Rehearing En Banc Denied March 22, 1978

Before ROBERTS, PHILLIPS, VOLLERS, JJ.

OPINION

This is an appeal from a conviction for sexual abuse of a child.[1] The jury assessed the appellant's punishment at eighteen years' confinement in the Texas Department of Corrections.

The appellant contends, in two grounds of error, that the trial judge erred in overruling the appellant's motion for a new trial because of jury misconduct. We affirm.

The trial testimony shows that on February 16, 1976, the appellant, with the intent to arouse or gratify his sexual desire, engaged in deviate sexual intercourse with the complainant. The complainant, a thirteen-year-old female, was not the appellant's spouse.

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[1]V.T.C.A., Penal Code, Section 21.10(a).

The appellant contends that a statement concerning the parole law, contained in a newspaper article posted on a bulletin board in the courthouse, was discussed by the jurors during their deliberations and that the statement was untrue and/or harmful. The appellant filed his motion for new trial and attached the signed and sworn affidavits of two jurors, Clinton Littleton and Mrs. Marvin Tolar.

The testimony from the hearing on the appellant's motion for new trial reveals that Barbara Lancaster, a reporter for the Stephenville Empire-Tribune, wrote an article entitled "What Makes Good Jurors?" This article was published in the Stephenville Empire-Tribune on April 21, 1976, and a copy of it was posted on a bulletin board in the courthouse.[2] The article stated:

"What Makes Good Juror?

"That can be answered simply. An informed juror makes a good juror.

"A juror needs to know that when a prosecutor asks for a 25 year sentence in the penitentiary he is asking for one fifth of that time.

" 'Juries think I am flat out of my mind when I ask for ten years for a defendant when he really deserves about two years. But what that jury may not realize is that with good behavior, all that criminal will serve will be two years,' says District Attorney Bob Glasgow.

" 'They also need to know,' says Glasgow, 'that when the defendant has come to trial, he has already exhausted all his probation. We cannot introduce into evidence other offenses which the defendant has committed.'

"Glasgow continued 'When a defendant comes to a jury trial, the only thing which the District Attorney can do is bring law enforcement officers to the stand. He can ask them four questions. "Do you know this defendant?"; "How long have you known him?"; "Do you know of his reputation in the community?"; and "Is it good or bad." '

"According to the district attorney, if a number of law enforcement officers testify that a defendant's reputation is bad, when it is indeed bad. Officers cannot testify how many times he has been caught, or how many times he has already had probation.

"The district attorney says that when more juries realize that the criminal will serve only one fifth of his sentence, they may understand why DA's ask for more time."

[2]The appellant also points out that a notice of the appellant's trial setting was on the same page as Lancaster's article.

The appellant's trial was on April 28, 1976.

The appellant also called three of the jurors to testify on his behalf at the hearing: Mrs. Price, Clinton Littleton, and Mrs. Marvin Tolar. Mrs. Price admitted that she read Lancaster's article on April 21, 1976. However, she unequivocally stated that she had not seen the article posted in the courthouse and that the jurors did not discuss the article. She admitted that there was a brief discussion of how much time the appellant would have to serve, but she thought that the discussion terminated when the foreman of the

jury admonished the jurors to obey the trial judge's instructions not to discuss such matters.[3]

Clinton Littleton testified that although he saw the article in the paper and on the courthouse bulletin board, he did not pay any attention to it. He also testified that the article was discussed in the jury room for a short period of time, but he remembered that the foreman asked the jurors not to discuss it again. He could not remember whether the article was discussed after the foreman's admonition. Littleton unequivocally stated that the article did not affect his vote on the issued of punishment.

Finally, Mrs. Marvin Toler testified that the article was discussed several times and that several jurors admitted that they had seen the article. She also believed that one of the jurors disregarded the foreman's admonition not to discuss the actual number of years the appellant would have to serve. However, Toler unequivocally testified that the article did not affect her vote on the issue of punishment.

Article 40.03, Vernon's Ann. C.C.P., provides in pertinent part that:

> "New trials, in cases of felony, shall be granted the defendant for the following causes, and for no other:
>
> "(7) Where the jury, after having retired to deliberate upon a case, has received other evidence. . . .

[3] In Moore v. State, 535 S.W.2d 357 (Tex.Cr.App. 1976), we stated that the trial judge should always instruct the jury at the punishment stage that it should not discuss or consider the parole laws.

> "(8) Where, from the misconduct of the jury, the court is of the opinion that the defendant has not received a fair and impartial trial. . . ."

This Court has treated statements of jurors regarding the possible effects of parole laws both as the receipt of other evidence, *cf.* Spriggs v. State, 160 Tex. Cr. R. 188, 268 S.W.2d 191 (1954), and as jury misconduct. *Cf.* May v. State, 167 Tex.Cr.R. 339, 320 S.W.2d 13 (1959). In Heredia v. State, 528 S.W.2d 847, 852 (Tex.Cr.App. 1975), we held that ". . . either principle may apply, depending upon the facts of the case," and stated that

> ". . . it is common knowledge that from time to time inmates of the Texas Department of Corrections are released on parole. E.g., Taylor v. State, Tex.Cr.App., 420 S.W.2d 601. Consequently, the mere mention of this common knowledge would not constitute the receipt of other evidence, nor would further discussion of it constitute receiving new evidence any more than discussion of any other matter of common knowledge by the jury. On the other hand, information may be given to the jury, by a juror or someone else, which would constitute receiving other evidence. Information which would consititute other evidence would include, for example, a juror relating his personal knowledge of some particular case from which the jury might then try to 'figure out' what the parole law is. Also, a misstatement of the law, by being incorrect, would constitute other evidence, since by being false it certainly could not be classified as 'common knowledge.' See e.g., Moore v. State, 171 Tex. Cr.R. 182, 346 S.W.2d 349. The receipt of such

> other evidence, even if nothing further be shown such as would constitute misconduct requiring a new trial under [Article 40.03] Section 8, on a proper set of facts could require reversal under [Article 40.03] Section 7."
> (Footnotes omitted)

The appellant specifically complains of the statement in the article that a ". . . criminal will serve only one fifth of his sentence. . . ." It is clear that the article was discussed in the juryroom.

However, Article 42.12, Section 15(a), Vernon's Ann. C.C.P., provides that a prisoner is eligible for parole only after he has served one third of the maximum sentence imposed or twenty years, whichever is shorter. The assertion in the article and discussed in the juryroom is therefore an incorrect assertion.[4]

Thus, the jury received other evidence and the issue now becomes one of whether this error is such that the judgment must be reversed. In McIlveen v. State, ... S.W.2d ... (Tex. Cr.App. 1977; No. 53,764 (delivered December 14, 1977), we stated that "[t]he standard which this Court has established for reversal requires the other evidence to have been 'detrimental to appellant' before the case must be reversed. Heredia v. State, supra; Marquez v. State, 172 Tex.Cr.R. 363, 356 S.W.2d 797 [1962]; Grizzell v. State, 164 Tex. Cr.R. 362, 298 S.W.2d 816 [1956]."

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[4] We note that even if the parole law had been correctly stated, it is "palpably erroneous" to assume that a defendant will be discharged when parole becomes available. See Sweed v. State, 538 S.W.2d 119, 120, n. 4 (Tex.Cr.App. 1976); Article 42.12, Section 15(a), Vernon's Ann. C.C.P.

In the present case, there is no evidence that any juror relied on or was influenced by the article or the jury's discussions of it. The trial judge did not err by denying the appellant's motion for new trial. Appellant's contentions are overruled.

The judgment is affirmed.

PER CURIAM

MANDATE

Trial Court No. 7292

THE STATE OF TEXAS.

TO THE 29TH. JUDICIAL DISTRICT COURT OF ERATH COUNTY—GREETINGS:

Before our COURT OF CRIMINAL APPEALS, on the 22nd. day of March A.D. 1978 the cause upon appeal to reverse your Judgment between Kenneth Leron Satterwhite, Appellant, vs. The State of Texas, Appellee, No. 54,003 was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the Court below, and the same being considered, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance. Appellant's Motion for Rehearing En Banc is Denied."

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 24th day of March A.D. 1978

THOMAS LOWE
Clerk.
/s/ Belva Myler
Deputy Clerk.

APPENDIX B

Pertinent portions of Texas statutes — Code of Criminal Procedure

Art. 37.07 Verdict must be general; separate hearing on proper punishment

Sec. 2.(a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

(b) If a finding of guilty is returned, in cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury.

Sec. 3.(a) Evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character.

(b) After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary and the order or procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(c) In cases where the matter of punishment is referred to the jury, the verdict shall not be com-

plete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

Art. 40.03 Grounds for new trial in felony

New trials, in cases of felony, shall be granted the defendant for the following causes, and for no other:

(7) Where the jury, after having retired to deliberated upon a case, has received other testimony; . . .

(8) Where, from the misconduct of the jury, the court is of the opinion that the defendant has not received a fair and impartial trial . . .

Art. 40.09 The record on appeal

(9) Defendant's brief

Each ground of error shall briefly refer to that part of the ruling of the trial court, charge given to the jury, or charge refused, admission or rejection of evidence or other proceedings which are designated to be complained of in such way so that the point of objection can be clearly identified and understood by the court. If the defendant includes in his brief arguments supporting a particular ground of error, they shall be construed with it in determining what point of objection is sought to be presented by such ground of error; and if the court, upon consideration of such ground of error in the light of arguments made in

support thereof in the brief, can identify and understand such point of objection, the same shall be reviewed notwithstanding any generality, vagueness or any other technical defect that may exist in the language employed to set forth such ground of error.

Art. 42.12 Adult Probation, Parole and Mandatory Supervision Law

Sec. 15(a) The Board is authorized to release on parole, with the approval of the Governor, any person confined in any penal or correctional institution of this State who is eligible for parole under Subsection (b) of this Section. The period of parole shall be equivalent to the maximum term for which the prisoner was sentenced less calendar time actually served on the sentence.

(b) Prisoners shall be eligible for release on parole when their calendar time served plus good conduct time equals one-third of the maximum sentence imposed or 20 years, whichever is less.

IN THE

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KENNETH L. SATTERWHITE,
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V.

THE STATE OF TEXAS,
Respondent

* * *

RESPONDENT'S BRIEF IN OPPOSITION

* * *

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KENNETH L. SATTERWHITE,

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RESPONDENT'S BRIEF IN OPPOSITION

* * *

STATEMENT

Petitioner was convicted in the District Court of Erath County, Texas, for sexual abuse of a child, and sentenced to confinement in the Texas Department of Corrections for a term of eighteen (18) years. After hearing, his Motion for a New Trial was denied by the trial judge, which judgment was later affirmed by the Texas Court of Criminal Appeals.

One week prior to Petitioner's trial, there appeared on the front page of the Stephenville Empire-Tribune an article entitled "What Makes A Good Juror?". The article included a quotation, attributed to the local district attorney, concerning the relationship of state parole laws and his decision on the length of sentence to seek.

Following his trial, Petitioner presented a Motion For New Trial to the state convicting court. Petitioner presented three of the jurors to testify on his behalf at the hearing on the motion: Mrs. Price, Mr. Clinton Littleton, and Mrs. Marvin Tolar. Mrs. Price admitted reading the article, but unequivocally stated that the jurors had not discussed it. Mr. Littleton testified that, although he had seen the article in the paper, he paid no attention to it. Littleton remembered briefly discussing the article in the jury room but stated that the foreman had asked the jurors not to discuss it again. He could not remember whether the article was discussed after the admonition, but stated unequivocally that the discussion had no effect on his vote and that the final verdict was based on the facts of the case. The third juror, Mrs. Marvin Tolar, stated she had heard the discussion but had not believed what was said, and denied that her vote was affected by the discussion.

The trial judge overruled Petitioner's Motion for New Trial, and his judgment was affirmed by the Court of Criminal Appeals.

REASONS THE WRIT SHOULD BE DENIED

The issue raised by the Appellant in this case is not novel. Appellant eloquently argues that the facts surrounding his case present problems of constitutional dimension which, at present, are unresolved and which have led to conflicting federal and state rulings. Such is not the case, and Respondent submits that the opinion of the Court below is consistent with the decisions rendered by this Court.

Petitioner contends that the state erroneously adopted the standard that Petitioner should bear the burden of proving prejudice arising from reception of extraneous evidence, yet the supporting cases he cites are not on point with the case at bar. Unlike the situation in *United States v. Howard*, 506 F.2d 865 (5th Cir. 1975), no juror

introduced evidence regarding the alleged participation of the defendant in other crimes. Nor was there an ex parte hearing conducted by the Court on an attempted bribe of a juror, thereby depriving Petitioner of knowledge of the extrinsic evidence, as in *Remmer v. United States*, 347 U.S. 227 (1954). Furthermore, there was no state or court official involved in action which placed extraneous evidence before the jury, as in *Parker v. Gladden*, 385 U.S. 363 (1966).

The above cases, unlike the instant case, involved instances where the circumstances and facts surrounding introduction of extraneous evidence were of a nature that the probability of prejudice was so great that due process was presumed lacking. In *Estes v. State of Texas*, 381 U.S. 532, 542-43 (1965), the court stated:

> "It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process."

The instant case clearly does not involve the injection of extraneous evidence into the trial process by either a procedure employed by the State or action on the part of a State or court official. Petitioner implies that this Court's holding in *Parker, supra*, embraces the rule that any jury contact with outside information involves such a probability of prejudice that due process must be presumed to have been denied. To the contrary, as noted in the dissent of Justice Harlan in *Parker, supra* at 368, this Court has firmly rejected the proposition that jurors must be "absolutely insulated from all expressions of opinion." Furthermore, Justice Harlan, citing *Marshall v. United States*, 360 U.S. 310, 312, noted that in cases involving jury contact with outside information, the

Court has preferred to allow "each case . . . (to) turn on its special facts." *Parker, supra* at 368.

The instant case does not involve facts similar to those in *Little v. United States*, 373 F.2d 861, 866 (10th Cir. 1934), where state action was found to deprive the Defendant of the right to a fair trial. Absent such state action, there must be identifiable prejudice, and the mere fact that the jury received extraneous information does not *ipso facto* render Petitioner's trial fundamentally unfair. Petitioner's interpretation of *Parker v. Gladden, supra*, is precisely what Justice Harlan warned against in his dissent when he wrote:

> ". . . though I believe unintentionally, the Court's opinion leaves open the possibility of automatically requiring a mistrial on constitutional grounds whenever any juror is exposed to any potentially prejudicial expression of opinion." *Parker, supra*, at 368.

Clearly the facts of the instant case involve no faulty state procedure nor state action "involving such a probability that prejudice will result," *Estes, supra* at 542, and therefore, the rule of *Stroble v. State of California*, 343 U.S. 181 (1952) and *Irvin v. Dowd*, 366 U.S. 717 (1961), that a substantial showing of prejudice in fact must be made applies.

Respondent submits that the Texas decisions in *McIlveen v. State*, 559 S.W.2d 815 (Tex.Crim.App. 1977) and *Heredia v. State*, 528 S.W.2d 847 (Tex.Crim.App. 1975) reflect that the Texas Court rulings are consistent with those of this Court. Further, Respondent submits that Petitioner has not made a substantial showing of prejudice in fact and, therefore, Petitioner has not been denied due process of law.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, for the reasons set forth above, Respondent respectfully prays that this Petition for Certiorari be in all things denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Dunklin Sullivan, Assistant Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that this 8th day of August, 1978, three copies of the above and foregoing Brief in Opposition were served on counsel for the Petitioner, Garry Lewellen, P.O. Box 652, Stephenville, Texas 76401, by depositing the same in the United States mail, postage prepaid.

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